Aryeh S. Friedman
Senior Attorney

Room 1116L2
295 North Maple Avenue
Basking Ridge, NJ 07920-1002
Phone: 908 221-2717
Fax: 908 221-4490
EMail: friedman@att.com

March 19, 2002

VIA ELECTRONIC FILING
Carol Mattey
Deputy Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC, 20554

Re: Bell Atlantic Corp. and GTE Corp., CC Docket No. 98-184

Dear Ms. Mattey:

Pursuant to the Public Notice issued by the Commission on March 12, 2002, AT&T Corp. ("AT&T") submits the following comments opposing Verizon Communications, Inc.'s ("Verizon's") letter request to count its (allegedly intentionally) unsuccessful "investment" in NorthPoint Communications Group, Inc. (NorthPoint) toward satisfaction of Condition XVI of the *Bell Atlantic/GTE Order*.[1] That condition requires Verizon to spend a total of at least $500 million within 36 months of the merger close "to provide services, including resale, that compete with traditional local telecommunications services offered by incumbent local exchange carriers or to provide

[1] *Applications of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, CC Docket No. 98-184,

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Advanced Services to the mass market … outside the Bell Atlantic/GTE Service Areas." As demonstrated below, Verizon's claim that its unsuccessful bid for NorthPoint constitutes "providing" out-of-region local services within the meaning of this Condition is preposterous. Verizon's argument shows, yet again, its enduring contempt for the Merger Order conditions it signs.[2]

Verizon's suggestion that its $150 million deposit for the purchase of NorthPoint should be applied to its satisfaction of this Condition is particularly preposterous in light

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15 FCC Rcd. 14032 (rel. June 16, 2000) (hereinafter the "*Bell Atlantic Merger Order*").

[2] Every time Bell Atlantic has agreed to conditions it has, after the merger has closed, disaffirmed or evaded them. In the Bell Atlantic/NYNEX merger, Bell Atlantic treated the "pricing and non-recurring charge" conditions it had agreed to, *Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp.*, 12 FCC Rcd. 19985, ¶ 185, as both substantively meaningless and procedurally unenforceable, declaring to the Commission after that merger was approved that it considered these conditions a "dead letter." Opening Brief of Bell Atlantic Corp., File No. E-98-05, at 4 (FCC March 13, 1998) ("BA Complaint Op. Br."). Verizon has similarly flouted numerous other conditions imposed with respect to this merger. For example, Genuity continues to assure investors that it is a *de facto* affiliate of Verizon, *see, e.g.,* Letter of Joan Marsh to Dorothy Attwood and David Solomon of August 8, 2001 (citing to a presentation to the CIBC World Markets Investor Conference on June 11, 2001) even though that is prohibited by the *Bell Atlantic Merger Order* ¶ 86. Similarly, Verizon characterizes the millions of dollars in penalties it has paid for failure to meet the performance standards set forth in the Merger conditions, *See* Exhibit 1, to Reply Comments of AT&T Corp to *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Notice of Inquiry,* CC Docket No. 98-146, FCC 01-223 (rel. Aug. 10, 2001), as simply "voluntary payments" for its failure to fully realize "incentives to deliver excellent performance" above and beyond the requirements of Section 271, *see, e.g.,* Verizon's March 6, 2002 Reply to AT&T's Comments on Verizon's request for a temporary suspension of Condition V (Carrier-to-Carrier Performance Plan) and Condition XIX (Additional Service Quality Reporting).

of NorthPoint's lawsuit against Verizon arising out of that "investment."[3] That lawsuit relates to "Verizon wrongfully terminating the Merger Agreement and Funding Agreement under false pretenses, and then reneging on its promises to invest $800 million in cash and over $500 million in assets."[4]

Indeed, according to NorthPoint, the entire "merger" was a scheme to defraud: to force NorthPoint into bankruptcy[5] and to steal NorthPoint's "proprietary, trade secret information (including business forecasts and pricing)."[6] Internal Verizon memoranda allegedly prepared "[w]ithin days of the signing of the Merger Agreement" proposed that "rather than merging with NorthPoint, Verizon should let NorthPoint go bankrupt and then buy NorthPoint cheap out of bankruptcy."[7] Verizon abandoned the merger because "Verizon and its management … determined that Verizon could devastate NorthPoint's business by reneging on the merger and could then usurp the DSL business opportunities and confidential trade secrets of NorthPoint, and because Verizon did not want to disclose to NorthPoint and others information about Verizon's DSL business as required

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3 AT&T appends hereto a copy of the First Amended Complaint in *NorthPoint v. Verizon*, California Superior Court (San Francisco), Case No. 317249, filed July 12, 2001. The original complaint was filed on December 8, 2000.

4 First Amended Complaint in *NorthPoint v. Verizon*, at ¶ 7.

5 *Id.*at ¶ 10 (the scheme dissuaded NorthPoint from pursuing other business strategies that would have staved off bankruptcy), 21 and 33 (NorthPoint told Verizon at the time negotiations were conducted that "if Verizon, after a few months, suddenly terminated the merger this would result in NorthPoint's bankruptcy").

6 *Id.* at ¶ 27.

7 *Id.* at ¶ 10; *see also*, ¶ 48.

by the Merger Agreement which, on information and belief, would have revealed unfair and predatory business practices."[8]

Thus, far from being an investment to compete out-of-region with the local incumbent LEC, Verizon allegedly made this investment to *eliminate* a competitor by driving that competitor into bankruptcy,[9] misappropriating business opportunities,[10] and obtaining and misusing that competitor's proprietary and market sensitive information, including pricing and business strategy information.[11]

Even if NorthPoint's allegations are not sustained at trial, Verizon's deposit for the purchase of NorthPoint, in light of Verizon's subsequent rescission of its agreement, does not, with or without the return of the deposit, satisfy the terms, let alone the intent, of Condition XVI of the *Bell Atlantic/GTE Order*. That Condition arose out of Bell Atlantic and GTE's assertions in their Joint Petition seeking approval of their Merger that this merger was in the "public interest" because only the merged entity could make the

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8 *Id.*at ¶ 12; *see also*, ¶ 38 ("Verizon [terminated the Merger Agreement] at a point in time when it knew that NorthPoint would not be able to arrange for alternative financing, such that NorthPoint would go bankrupt and Verizon would then be able to usurp NorthPoint's business') and 44 ("contemporaneously with notifying NorthPoint and the public of the termination of the merger, Verizon launched an aggressive sales and marketing strategy to expand Verizon's DSL business and to exploit the damage done to NorthPoint by Verizon's bad faith termination").

9 *Id.* at ¶ 38 ("Verizon [terminated the Merger Agreement] at a point in time when it knew that NorthPoint would not be able to arrange for alternative financing, such that NorthPoint would go bankrupt and Verizon would then be able to usurp NorthPoint's business").

10 *Id.* at ¶ 44 ("contemporaneously with notifying NorthPoint and the public of the termination of the merger, Verizon launched an aggressive sales and marketing strategy to expand Verizon's DSL business and to exploit the damage done to NorthPoint by Verizon's bad faith termination").

"substantial investments" necessary to obtain the facilities required to offer out-of-region local services.[12] The Applicants in their Petition stated that "the combined company plans to enter at least 21 [out-of-region] markets."[13] Later, in seeking approval of the out-of-region entry condition proposed by the Applicants, they touted GTE's local service facilities as "islands in the other RBOCs' seas that provide a springboard for the merged company's expansion on a national basis into markets outside its traditional telephone service areas."[14] The merged entity referred to the $500 million out-of-region commitment as an integral part of its existing "investment" in pursuing its "strategy of becoming a full service provider on a nationwide basis."[15]

Based on these representations, the Commission approved the out-of-region condition which provided that "between the merger closing date and the end of the 36th month thereafter, the combined firm will spend at least $500 million to provide competitive local service and associated services outside of the Bell Atlantic and GTE

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11 *Id.* ("even after the termination, Verizon (including Mr. Smith) used and misappropriated trade secret information of NorthPoint, including NorthPoint's business forecasts and pricing").

12 Public Interest Statement, appended to Public Notice, CC Docket 98-184, issued by the Commission on October 8, 1998 ("Public Interest Statement") at 7; Kissell Decl. ¶¶ 5, 9, 12.

13 Public Interest Statement at 6; see also Kissell Decl. ¶¶ 7, 14.

14 Supplemental Filing of Bell Atlantic and GTE, CC Docket 98-184, Jan. 27, 2000, ("Supp. Filing") at 10.

15 Reply of Bell Atlantic and GTE in Support of their Supplemental Filing, CC Docket 98-184, filed March 16, 2000 at 17.

legacy service areas."[16] The Commission responded to AT&T's claims that Verizon's out of region entry commitment was a "sham" by elaborating on what it understood Verizon's commitment to be. It stated:

> We believe that the Applicants' out-of-region competition commitment is sufficient to ensure that residential consumers and business customers outside of Bell Atlantic/GTE's territory will benefit from meaningful, facilities-based competitive service. We also anticipate that this condition will stimulate competitive entry into the Bell Atlantic/GTE region by the affected incumbent LECs.[17]

Verizon claims that its deposit satisfied its obligation under Condition XVI, to "'spend' money to 'obtain' 'facilities, operating support systems, or equipment that are used to serve customers in Out-of-Region Market.'"[18] That is incorrect for at least two reasons. First, by payment of a deposit, an acquirer "obtains" nothing – only when an acquirer makes full payment (immediately or on credit) is anything "obtained," and here Verizon made no further payments.[19] More fundamentally, as is clear from the Commission's discussion of Verizon's commitment, Condition XVI contemplates that the facilities "obtained" by Verizon be used out-of-region while Verizon is still the acquiror. That is, it is Verizon's role that will make out-of-region customers more willing to purchase services provided from those facilities, and increase the likelihood of in-region retaliation by the affected out-of-region RBOC(s). This Condition clearly

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16 *Bell Atlantic Merger Order*, ¶ 319.

17 *Id*, ¶ 321.

18 Letter by Gordon R. Evans, Vice President, Federal Regulatory, to Ms. Carol Mattery, Deputy Chief, Common Carrier Bureau, dated March 7, 2002 ("Evans Letter") at 2, citing to Appendix D to the *Bell Atlantic Merger Order*, Conditions, ¶¶ 43-44.

cannot be satisfied by a deposit made in connection with an agreement never completed[20] and where Verizon's role with respect to the relevant facilities was expressly and publicly disavowed by its withdrawal from the agreement. Indeed, Verizon's disavowal allegedly eroded public confidence in NorthPoint and its ability to manage those facilities, and contributed to its demise.[21]

Accordingly, Condition XVI cannot be satisfied by offers or agreements that are rejected or rescinded. Otherwise, one would expect Verizon or the other RBOCs will soon claim that any offer or agreement made to buy another RBOC (regardless of how preposterous that would be under the antitrust laws,[22] and regardless of whether that offer/agreement is withdrawn in the face of threats of retaliatory entry) should be

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19 Nor is the deposit otherwise an "investment in, or contribution to, *ventures that provide* Competitive Local Service activity in Out-of-Region Markets by those ventures" (emphasis added). *Bell Atlantic Merger Order*, Conditions, ¶ 45.

20 Even if the deposit was not refunded by NorthPoint presumably because of the allegations in its complaint.

21 The same would be true with respect to "investments in, or contributions to, *ventures that provide* Competitive Local Service activity in Out-of-Region Markets by those ventures" *Bell Atlantic Merger Order*, Conditions, ¶ 45 (emphasis added). This paragraph contemplates *ventures that provide the service backed by the reputation of Verizon as an investor*. That will induce out-of-region purchases and in-region retaliation. Here NorthPoint never provided the qualifying service backed by the reputation of Verizon as an investor.

22 Indeed, the proposed Verizon/NorthPoint merger clearly violated the antitrust laws. *See*, Petition of AT&T Corp. to to Deny Joint Application, *Joint Application for Consent To Transfer Control Filed By NorthPoint Communications, Inc. And Verizon Communications*, CC Docket No. 00-157 filed October 2, 2000 (demonstrating that the merger would, *inter alia*, eliminate one of Verizon's most significant DSL competitors). It also clearly violated 47 U.S.C. § 271 and the *Bell Atlantic Merger Order*, because the proposed transaction would allow Verizon to own and control facilities used to provide in-region interLATA data services – over

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considered an out-of-market entry. Verizon's attempt to redefine its commitment under Condition XVI invites the very type of "sham" out-of-region entry AT&T warned about in its initial comments.

The Commission therefore should reject Verizon's request.

Sincerely,

/s/ Aryeh S. Friedman
Aryeh S. Friedman

cc: Carol Mattey
Anthony Dale
Mark Stone
Qualex International at qualexint@aol.com
Gordon R. Evans, Vice President, Federal Regulatory, Verizon

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the very same Genuity Internet backbone facilities that the Commission ordered Verizon to divest only in the Bell Atlantic/GTE merger.

CERTIFICATE OF SERVICE

I, Karen Kotula, do hereby certify that on this 19th day of March, 2002, a copy of the letter comments of AT&T Corp. opposing Verizon Communications, Inc.'s letter request was mailed by U.S. mail, first class delivery, postage prepaid, on the parties listed below:

William Caton, Acting Secretary*
Federal Communications Commission
Enforcement Division, FCC
445 12th Street, S.W., Room TW-B204
Washington, DC 20554

Qualex International*
445 12th Street, S.W., Room CY-B402
Washington, DC 20554

Carol Mattey*
Deputy Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC, 20554

Mark Stone*
Common Carrier Bureau
445 12th Street, S.W., Room 5-C100
Washington, DC 20554

Anthony Dale*
Common Carrier Bureau
445 12th Street, S.W., Room 5-C100
Washington, DC 20554

Gordon R. Evans
Vice President, Federal Regulatory
Verizon
1300 I Street, NW Suite 400 West
Washington, D.C. 20005

/s/ Karen Kotula
Karen Kotula

* Electronically served